STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2010
v	No. 290344 Newaygo Circuit Court
JUSTIN JAMES SCHULTZ, Defendant-Appellant.	LC No. 2002-007769-FH

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals, by leave granted, the trial court order granting the prosecution's motion for relief from judgment. Because the trial court abused its discretion in granting relief from judgment based upon MCR 2.612 (C)(1)(c), we reverse.

In 2002, defendant entered a no contest plea to and was convicted of involuntary manslaughter, MCL 520.321(c), stemming from an incident at a party. Defendant, while under the influence of alcohol, apparently became involved in an altercation and punched another individual, who toppled down a flight of stairs after the blow. The individual ultimately died from injuries he incurred in the fall. Defendant was placed on three years probation as a result of the conviction. After the appropriate five-year time period had passed, defendant moved to have the conviction expunged from his record pursuant to MCL 780.621. The motion was granted in June 2008. However, in August 2008, defendant was involved in another altercation and was thereafter charged with and pled guilty to aggravated assault. The prosecution then brought a motion for relief from the judgment setting aside defendant's manslaughter conviction pursuant to MCR 2.612. The trial court granted the prosecution's motion, reinstating defendant's conviction. This appeal followed.

On appeal, defendant first argues that relief from judgment should not have been granted, given that MCR 2.612 presents a civil remedy not applicable to overturn an expungement in a criminal case. We disagree.

The interpretation and application of court rules are questions of law subject to de novo review. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 20; 777 NW2d 722 (2009); *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 553, 652 NW2d 851 (2002). When interpreting a court rule, we apply the same rules as used when we engage in statutory interpretation. *Wilcoxon*, 252 Mich App at 553. Court rules are to be interpreted to give effect

to the intent of the Supreme Court, the drafter of the rules. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

The starting point in interpreting a court rule is the language of the rule itself. *Wilcoxon*, 252 Mich App at 553. If the language of the rule is clear and unambiguous, then no further judicial interpretation is required or allowed. *Id.* Only when the language is ambiguous is judicial construction appropriate. *Id.* An ambiguity exists if two provisions irreconcilably conflict with each other or when a provision or term is equally susceptible to more than a single meaning. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). If judicial construction is required, this Court must adopt a construction that best accomplishes the purpose of the court rule. See *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 371; 711 NW2d 391 (2006).

MCR 2.612, found in the "civil procedure" section of the Michigan court rules, governs a motion for relief from judgment. Michigan court rules applicable to criminal procedure are found at MCR 6.000 et seq. MCR 6.001(D) provides, in relevant part:

> The provisions of the rules of civil procedure apply to cases governed by this chapter, except
>
> (1) as otherwise provided by rule or statute,
>
> (2) when it clearly appears that they apply to civil actions only, or
>
> (3) when a statute or court rule provides a like or different procedure.

According to defendant, both MCR 6.001(D)(2) and (3) are applicable to MCR 2.612 in this matter, such that the stated rule of civil procedure does not apply to criminal cases governed by chapter 6 of the Michigan court rules.

The text of MCR 2.612 makes no specific reference to either civil or criminal matters. Instead it generically refers to relief from a final judgment, order, or proceeding and the grounds for relief, giving no clear appearance that the rule is to apply to only civil actions. Moreover, our review of relevant case law indicates that MCR 2.612 has been referenced in criminal cases, indicting that it has been applied to criminal matters.

In *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005), a panel of this Court indicated that a defendant had failed to preserve an issue for appeal by moving for a new trial in the lower court "or by moving for relief from judgment under MCR 2.612(C)(1)(b)."[1] Similarly, in *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998) it was acknowledged that "a motion for a new trial on the basis of newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules. See MCR 2.611, 2.612." Finally, in *People v Wynn*, 197 Mich App 509, 511; 496 NW2d 799 (1992), the trial court dismissed

[1] MCR 2.612(C)(1)(b) provides for relief from judgment on the basis of newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)."

criminal charges against a defendant, then reinstated the charges on the prosecution's motion. MCR 2.612 was referenced in that case as follows:

> In reversing its prior decision to dismiss the charges, the trial court recognized its error in usurping the charging authority of the prosecutor. *People v Farmer,* 193 Mich App 400; 484 NW2d 407 (1992); *People v Jackson,* 192 Mich App 10, 15; 480 NW2d 283 (1991); MCR 2.612(C)(1)(a). *Id.* (emphasis added).

Subrule (C)(1)(a) permits relief from judgment where there has been "mistake, inadvertence, surprise, or excusable neglect." Though the basis for relief in the present case is MCR 2.612(C)(1)(c), as opposed to MCR 2.16(C)(1)(a) or (b) as referenced in the above cited cases, there is no reason to find that all of the grounds for relief from judgment set forth in MCR 2.1612(C)(1) cannot be used in criminal cases. Where one basis is found to be applicable, it logically follows that another basis found in the same court rule is equally applicable. Based upon the above, we find that MCR 6.001(D)(2) is inapplicable in the present matter.

MCR 6.001(D)(3)(when a statute or court rule provides a like or different procedure) is similarly inapplicable. Though defendant contends that MCR 6.500 *et seq*. provides for a criminal procedure similar to MCR 2.612, that chapter of the court rules applies specifically to matters of post appeal relief only. The present case was not a post appeal matter.

Defendant next argues that even if MCR 2.612 is applicable to criminal matters, the prosecution did not establish sufficient grounds for relief from judgment. We agree.

MCR 2.612 allows for relief from a judgment or order on specific grounds. These include mistake (2.612(C)(1)(a)); fraud, misrepresentation, or other misconduct of an adverse party (MCR 2.612(C)(1)(c)); and any other reason justifying relief from the operation of the judgment (MCR 2.612(C)(1)(f)). A trial court's decision to grant relief based on this court rule is discretionary and will not be disturbed absent an abuse of discretion. *Huber v Frankenmuth Mutual Ins Co,* 160 Mich App 568, 576; 408 NW2d 505 (1987).

Here, the trial court relied upon MCR 2.612(C)(1)(c) in granting the prosecution's motion for relief from judgment, stating:

> . . . the Court would think that Sub C: "Fraud, intrinsic or extrinsic, misrepresentation or other misconduct of an adverse party, [would apply.]" [I]n this particular case it would consider the failure to grant this to be essentially a fraud on the public.
>
> The Court initially thought when it sentenced five, six years ago in January of 2003 that this was the act of violence which created death in that case was just a matter of unfortunate circumstance. That it really didn't have anything to do with an act of [a] violent person, but it did have to do with the proximity of an assault to an open stairway; and had that open stairway not been there essentially all that would have happened would have been perhaps some bruises. It did not consider the individual here a danger to the community from violent assaultive behavior. He represented at the time of his hearing that that was not the

> case, and that he had controlled his use of alcohol because the Court recollects it specifically asked him that question on the stand.
>
> This recent behavior so close in proximity demonstrates that he is very definitely a danger to any human being from violent assaultive behavior . . .

From the above, it can be determined that the trial court essentially found three bases for setting aside the expungement order: (1) defendant's (mis)representation that he was not a danger to the community; (2) defendant's (mis)representation that he had controlled his use of alcohol, and; (3) the court's misjudgment of defendant's propensity for violence. Our review of the record, however, reveals no misrepresentations or fraud upon the court.

"A fraud is perpetrated on the court when some material fact is concealed from the court or some material misrepresentation is made to the court." *Matley v Matley (On Remand),* 242 Mich App 100, 101; 617 NW2d 718 (2000). The proof required to sustain a motion to set aside a judgment because of fraud is "of the highest order." *Kiefer v Kiefer,* 212 Mich App 176, 179; 536 NW2d 873 (1995); *Williams v Williams,* 214 Mich App 391, 399; 542 NW2d 892 (1995).

At his plea hearing, defendant apologized for his actions and affirmatively stated that he would "not engage in any type of aggressive or assaultive behavior in the future." At his sentencing hearing, defendant indicated that he was remorseful and ashamed of his behavior and that he would never do anything like that again. Defendant made a similar promise at the expungement hearing. However, a claim of fraud generally cannot be based on a promise of future conduct. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). While an exception to this rule exists if a promise is made in bad faith without the intention to perform it (*Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976)), there must be evidence related to the conduct of the defendant at the time he made the representations or shortly thereafter establishing such bad faith. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 378; 689 NW2d 145 (2004).

In this matter, not only was defendant's promise to refrain from assaultive behavior concerned with his future conduct, there was no evidence presented from which it could be found or even inferred that when defendant promised that he would not engage in future assaultive behavior, he did not intend to abide by his promise. Indeed, after his conviction, defendant successfully completed a three-year probationary term, apparently without incident, and continued two additional years after the completion of his probation without any assaultive behavior. There was nothing in defendant's conduct at the time he made the representations or shortly thereafter that demonstrated an intention on defendant's part to deceive or misrepresent himself to the court or to the public. The trial court's finding that defendant falsely represented that he was not a danger to the community was thus in error.

With respect to alcohol use, when asked at his expungement hearing whether he continued to consume alcohol, defendant indicated that he still did so approximately two to three times per week, and occasionally attended parties where alcohol was consumed—despite the fact that he considered alcohol to be a factor contributing to the manslaughter charge. Defendant was not specifically asked if he had his alcohol use under control and made no representation that he did. Instead, defendant readily admitted to continued alcohol use without any implicit or explicit

acknowledgment that he had a drinking problem. The trial court's finding that defendant misrepresented that he had his alcohol use under control was also in error.

In sum, while the court may have personally misjudged defendant, there is no indication that the misconception arose by perjury, fraud, concealment or other misrepresentation on defendant's part. The trial court abused its discretion in setting aside the expungement order on the basis of MCR 2.612(C)(1)(c).

The prosecution contends that though the trial court relied upon MCR 2.612(C)(1)(c) in granting relief from judgment, the decision also appears to have been based upon MCR 2.612(C)(1)(e) and (f), and MCR 2.612(C)(3). There is nothing in the record, however, to indicate that the trial court even considered, much less relied upon, any of the above subrules in granting relief from judgment. Moreover, the prosecution provides no authority on these subrules or a comprehensive analysis concerning their application to the present matter. There is thus no need to consider the prosecution's argument on these issues. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering